Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Computer III Further Remand Proceedings:	)	
Bell Operating Company	)	CC Docket No. 95-20
Provision of Enhanced Services	)	
	)	
1998 Biennial Regulatory Review --	)	
Review of *Computer III* and ONA	)	CC Docket No. 98-10
Safeguards and Requirements	)	

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Richard J. Metzger
Emily M. Williams
Association for Local
Telecommunications Services
888 17 Street, N.W., Suite 900
Washington, D.C. 20006
(202)969-2583

March 26, 1998

SUMMARY

These initial comments of ALTS are limited to three matters. First, the Commission cannot comply with the Ninth Circuit's remand in California v. FCC, 39 F.2d 919 (9th Cir. 1994)("California III") in these proceedings if the Commission elsewhere grants the current section 706 petitions of Bell Atlantic, US WEST, and Ameritech, seeking (among other matters) forbearance from enforcement of sections 251(c) and 271 as they apply to advanced data services.[1]

Second, the Commission cannot waive the requirements of section 251 in order to permit ISPs to request unbundled network elements from ILECs because ISPs are not "carriers" as defined by the Telecommunications Act.

Third, the Commission cannot and should not consider eliminating either its structural or CEI rules for BOC provisioning of intraLATA information services at the present time because the BOCs are not currently complying with existing statutory requirements for the provisioning of interLATA information services.

---

[1] See the Order dated March 17, 1998, in CC Docket Nos. 98-11, 98-26, and 98-36 consolidating these petitions for comment and reply.

TABLE OF CONTENTS

ARGUMENT 1

I. FORBEARANCE FROM ENFORCEMENT OF SECTIONS 251(c) AND 271 AS REQUESTED BY THE RBOCS WOULD EFFECTIVELY PREVENT THE COMMISSION FROM COMPLYING WITH THE NINTH CIRCUIT'S REMAND 3

II. SECTION 251 PERMITS ONLY "CARRIERS" ACCESS TO UNBUNDLED NETWORK ELEMENTS PURSUANT TO SECTION 251(c)(4) 9

III. THE COMMISSION SHOULD NOT CONSIDER "STREAMLINING" REGULATION OF BOC INTRALATA INFORMATION SERVICES UNTIL THE BOCS COMPLY WITH EXISTING REQUIREMENTS FOR THEIR INTERLATA PROVISIONING 12

A. Bell Atlantic Is Provisioning InterLATA Information Services Without Complying With Section 272 14

B. The RBOCs Are Violating their CEI Plans By Discriminating Against ISP Traffic Carried by CLECs Through Their Refusal to Pay Reciprocal Compensation 16

C. BellSouth Has Created An In-Region CLEC to Provision In-Region Information Services, As Well as Other Services, Without Complying with Section 272 19

CONCLUSION 20

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Computer III Further Remand Proceedings:	)	
Bell Operating Company	)	CC Docket No. 95-20
Provision of Enhanced Services	)	
	)	
1998 Biennial Regulatory Review --	)	
Review of *Computer III* and ONA	)	CC Docket No. 98-10
Safeguards and Requirements	)	

COMMENTS OF THE ASSOCIATION
FOR LOCAL TELECOMMUNICATIONS SERVICES

Pursuant to the Further Notice of Proposed Rulemaking in these dockets released January 29, 1998 (FCC 98-8; "Streamlined Information Services FNPRM"), the Association for Local Telecommunications Services ("ALTS") hereby comments on the proposed discharge of the Ninth Circuit's remand, and on the proposed streamlined requirements for BOC provisioning of information services.

ARGUMENT

The current FNPRM arises out of the decades-old efforts of the Commission to ensure that the growth and competitiveness of the information services industry is not impeded by its need for

telecommunications services provided by monopoly-based telecommunications carriers. These various efforts, ranging from strict structural separations and comparably efficient interconnection plans ("CEI"), to "fundamental unbundling" of incumbent networks to ISPs via Open Network Architecture ("ONA")[2] have had their successes and failures in protecting ISPs, while also minimizing the attendant burden on incumbents and thereby permitting BOCs an appropriate level of participation in ISP markets subject to certain strict requirements.

To its credit, the Commission now recognizes in the Streamlined Information Services FNPRM that it need no longer employ simplistic assumptions about the nature of the telecommunications market in discharging this task. Instead, the FNPRM expressly refers to the Commission's efforts to open up local telecommunications markets to competition, and proposes to rely on those efforts both in complying with the Ninth Circuit's

---

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) ("Computer III").

most recent remand of Computer III in California III,[3] and also with the requirements of the Telecommunications Act of 1996 ("1996 Act") concerning BOC provisioning of information services.

While ALTS agrees the Commission should factor its efforts to encourage local competition into its analysis of whether streamlined regulation of BOC provisioning of information services now makes sense, ALTS strongly urges that this assessment be founded upon a realistic assessment of the current status of this process. An unduly optimistic reliance upon local competition as a substitute for the "fundamental unbundling" required by the Ninth Circuit would only trigger yet another remand, and possibly a stay of any "streamlined" BOC requirements. Accordingly, ALTS files these comments to inform the Commission of various factors and events that should temper any reliance here upon its local competition efforts.

I. FORBEARANCE FROM ENFORCEMENT OF SECTIONS 251(c) AND 271 AS REQUESTED BY THE RBOCS WOULD EFFECTIVELY PREVENT THE COMMISSION FROM COMPLYING WITH THE NINTH CIRCUIT'S REMAND.

Bell Atlantic, US WEST and Ameritech have each filed section

---

[3] California v. FCC, 39 F.2d 919 (9th Cir. 1994).

706 petitions asking the Commission to, among other matters, forebear from enforcing sections 251(c) and 271 as they apply to the BOCs' provisioning of data services. These three petitions have been consolidated for the purpose of comment and replies, which are now due April 6th and May 6th, respectively.

These petitions may well have merit to the extent they request relief from matters such as accounting requirements, depreciation provisions, or tariffing. However, the RBOCs are also asking to escape the core pro-competitive provisions of the 1996 Act -- sections 251(c) and 271 -- via section 706 forbearance. Such a request is plainly frivolous.

First, Section 10(d) (the portion of the 1996 Act which defines forbearance) specifically provides that:

> "Except as provided in section 251(f) [relating to rural carriers] the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented."[4]

Congress' limitation of the Commission's forbearance power in

---

[4] 47 U.S.C. § 160.

section 10 plainly controls the meaning of forbearance under section 706, since otherwise section 706 could be used to completely evade the fundamental Congressional policy set forth in Section 10.[5]

Second, the Commission has by rulemaking proceeding already defined the unbundled network elements that must be provided by incumbent carriers. The high speed broadband local access that Bell Atlantic and other RBOCs seek to exempt from any unbundling requirement clearly comes under the Commission's current definition of what must be offered as an unbundled element.[6] In its Local Competition Order the Commission explained that the

---

[5] The RBOCs' only response to section 10 is to claim that the absence of similar restrictions in section 706 somehow increases the Commission's authority under the latter provision. See, e.g., Bell Atlantic Petition at 10 (the section 10 proviso "is an exception only to the Commission's forbearance authority under Section 10(a)"); US WEST Petition at 36 n.15 ("By contrast [with section 10], the more targeted grant of forbearance authority in Section 706 contains no such limitation"); and Ameritech Petition at 14 n. 23 ("Section 706(a), however, represents an independent grant of forbearance authority that is not so limited").

[6] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd, 15499 ¶ 380 (1996) ("Local Competition Order").

definition of a loop "includes, for example, . . . two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals."[7] Thus, the RBOCs' section 706 petitions are simply poorly concealed petitions for reconsideration of the Commission's Local Competition Order.

Third, even if Bell Atlantic's high speed broadband services did not come under the definition of unbundled elements contained in Section 51.319 of the Commission's Local Competition rules, the rules also dictate the procedures that must be followed in determining when additional elements must be made available. Under Section 51.317, any element that a carrier wishes to obtain as an unbundled network element must be made available, except under very limited circumstances, if a state commission decides that it is technically feasible to provide such element. Clearly, under Section 51.317 it is the states (not the

---

[7] Id. at ¶ 380; see also 47 C.F.R. § 51.319(c) which includes "line-side facilities [including] the switch line card" in the definition of the unbundled switching element. The line card enables the ILECs to provide high speed broadband local access.

Commission) that make a determination in the first instance as to whether additional elements should be made available.

The Commission may, of course, change its rules after adequate notice and comment under the Administrative Procedure Act, or it can waive one of its rules if the special circumstances warranting a waiver are present. Because the requirements for a waiver of the Commission's rules have not been met in this case,[8] and there has been no rulemaking proceeding, the Commission may not grant the RBOCs' request.

The significance for the present proceeding of the RBOCs' efforts to escape sections 251(c) and 271 is obvious. If the Commission were to forbear from enforcing sections 251(c) and 271 (contrary to the requirements of section 10 and the Local Competition Order set forth above), it could not then rely upon these same provisions to discharge the Ninth Circuit's remand. In the FNPRM, the Commission has stated that it would rely on

---

[8] Northeast Cellular Telephone Co., L.P. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

those sections (FNPRM at ¶ 31):

> "In our view, the unbundling requirements imposed by section 251 and our implementing regulations (hereinafter referred to as 'section 251 unbundling') are essentially equivalent to the 'fundamental unbundling' requirements proposed by the certain commenters, and rejected by the Commission as premature, in the BOC ONA Order ... [O]ne of Congress' primary goals in enacting section 251 -- to bring competition to the largely monopolistic local exchange market -- is more far-reaching than the Commission's goal for ONA, which has been to preserve competition and promote network efficiency in the developing, but highly competitive, information services market."

Even assuming the Commission were entitled to rely upon its Local Competition regulations in trying to discharge the Ninth Circuit's remand despite the Eighth Circuit's vacation of its pricing components (a point which ALTS does not concede),[9] it is

---

[9] The Streamlined Information Services FNPRM itself acknowledges the difficulties encountered in advancing local competition (at ¶ 32): "We also recognize that the development of competition in the local exchange market has not occurred as rapidly as some expected since the enactment of the 1996 Act," citing to the Common Carrier Bureau Seeks Recommendations on Commission Actions Critical to the Promotion of Efficient Local Exchange Competition proceeding, Public Notice, CCB Pol 97-9, DA 97-1519 (released July 18, 1997). See also FNPRM at ¶ 51: "We recognize that the BOCs remain the dominant providers of local exchange and exchange access services in their in-region states", noting that "The BOCs currently account for approximately 99.1 percent of the local service revenues in those markets," IAD, Telecommunications Industry Revenue: TRS Worksheet Data, 11 FCC

(continued...)

manifest that the Commission cannot rely upon sections 251(c) or 271 if it were to forebear from enforcing those provisions.[10] Accordingly, ALTS respectfully requests that the Commission rule here that section 706 does not permit forbearance from enforcement of sections 251(c) and 271. Once it resolves this threshold issue, it can then look to whether the current state of local competition is sufficient to meet the Ninth Circuit's requirement of "fundamental unbundling."[11]

II. SECTION 251 PERMITS ONLY "CARRIERS" ACCESS TO UNBUNDLED NETWORK ELEMENTS PURSUANT TO SECTION 251(c)(4).

The Streamlined Information Services FNPRM asks whether the

---

[9](...continued)
Rcd at 21912, ¶ 10. The measured pace of local competition is also underscored by the fact that no RBOC has yet complied with the requirements of section 271.

[10] Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

[11] 39 F.3d at 930: "In Computer III, the FCC adopted general standards for ONA which the BOCs needed to satisfy as a precondition for lifting structural separation and which, when met, would eliminate the need for CEI plans ... the plans actually submitted pursuant to Computer III, however, did not meet those standards. The FCC recognized in the order that the technology it thought in Computer III would soon permit open access and serve as a prerequisite to structural separation was not available; yet it approved the plans. This was a change in policy."

Commission has the authority to permit ISPs to request unbundled network elements ("UNEs") even where such ISPs are not "carriers" as defined by the 1996 Act (at ¶ 96):

> " ... we seek comment regarding whether, pursuant to our general rulemaking authority contained in sections 201-205 of the Act, and as exercised in the *Computer III*, *ONA*, and *Expanded Interconnection* proceedings, we can and should extend some or all rights accorded by section 251 to requesting telecommunications carriers to pure ISPs."

First, while the Commission's desire to assist the ISP industry in breaking free of any dependance on local incumbents is laudable, the 1996 Act is unmistakably clear in restricting access to UNEs only to "carriers" as carefully defined by the 1996 Act.[12] Indeed, the Commission expressly rejected efforts by end users and ISPs to obtain access to UNEs in the Local

---

[12] Streamlined Information Services FNPRM at ¶ 32: "We recognize that, according to the terms of section 251, only 'requesting telecommunications carriers' are directly accorded rights to interconnect and to obtain access to unbundled network elements." See 47 U.S.C. § 153(44), defining "telecommunications carrier."

The Commission currently interprets the simple provisioning of an information service as precluding any Title II regulation of any common carrier service that might be contained with an information service.

Competition Order on this ground.[13] The Commission should not change so recent an interpretation.

Second, ALTS respectfully but urgently points out that section 10's prohibition of any forbearance from enforcement of section 251(c) would become meaningless if the Commission actually had the power to jettison the clear statutory requirements of section 251(c) through the use of its long-standing rulemaking powers. Thus, any effort to "forbear" from enforcing the "carriers-only" restriction in section 251 would encounter the same legal barriers described in Part I, supra, concerning the RBOCs' section 706 petitions.

Third, any attempt by the Commission to alter the provisions of section 251, even if motivated by the pro-competitive goal of assisting the ISPs, would necessarily undercut the Commission's ability to rely on section 251 and its implementing regulations in discharging the California III remand. It simply is not possible to argue that section 251 guarantees the "fundamental unbundling" mandated by the Ninth Circuit if the Commission also

---

[13] ¶ 33.

asserts the power to end-run section 251's unambiguous exemption from forbearance set forth in section 10.

Fourth, if local competition is actually working as envisioned by the Commission (which is an inherent requirement of any reliance the Commission might place upon it in the present proceeding), then it necessarily follows that ISPs would enjoy full access to UNEs via the new entrants. The defining aspects of a competitive market is its ability to respond to customer demands with prices corresponding to forward-looking costs. However, if CLECs are not providing ISPs with such capacity and prices for UNEs (which is the only possible justification for providing ISPs the same rights as CLECs), then the Commission's competitive regime for local telecommunications is plainly not yet functional, and could not be used to discharge the Ninth Circuit's remand.

III. THE COMMISSION SHOULD NOT CONSIDER "STREAMLINING" REGULATION OF BOC INTRALATA INFORMATION SERVICES UNTIL THE BOCS COMPLY WITH EXISTING REQUIREMENTS FOR THEIR INTERLATA PROVISIONING.

The Streamlined Information Services FNPRM proposes a substantial simplification of structural and CEI requirements for

various new and existing information services provided by the BOCs. Because certain statutory requirements apply to BOC provisioning of interLATA information services as opposed to intraLATA services, these proposals are necessarily linked to whether the service is intraLATA or interLATA. For example, the Streamlined Information Services FNPRM proposes to eliminate all structural requirements for intraLATA information services (¶¶ 43-59), to remove CEI requirements from new intraLATA information services (¶¶ 60-65), and to eliminate CEI requirements from any BOC intraLATA services provided through an section 272-compliant subsidiary (¶¶ 66-72).

Aside from the inherent difficulty in defining a "new" information service (which turns the FNPRM's second proposal into a loophole so large that any remaining restrictions would become meaningless), ALTS believes these restrictions might well make sense if current statutory rules and regulations were being obeyed by the BOCs.

Unfortunately, as shown below, they are not. Indeed, it is apparent that BOCs are openly defying the existing regulatory

scheme by cutting off payments plainly owed to their competitors for carrying ISP traffic, by setting up in-region CLEC subsidiaries that will provide information services without complying with either section 271 or 272, and by providing in-region interLATA services directly without section 271 or 272 compliance. ALTS respectfully urges that no "streamlining" of the regulation of BOC information services even be considered until the BOCs start complying with existing interLATA requirements. The point here is simple. The Commission cannot start relaxing its structural or CEI regulation of the BOCs on an intraLATA basis when BOC violations of interLATA information services requirements are not being checked.

A. Bell Atlantic Is Provisioning InterLATA Information Services Without Complying With Section 272.

Bell Atlantic provides an excellent example of how current restrictions on interLATA information services are being flouted by the RBOCs. All the BOCs are entitled to provide intraLATA access to interLATA information services, and also to market those access services. However, a BOC's permitted information access service turns into an interLATA information service -- and

thereby requires, at a minimum, BOC provisioning via a section 272 subsidiary -- once a BOC: (1) bundles its charges for information access with the provisioning of an interLATA service (even where the interLATA portion is provided by a non-affiliated ISP or CLEC); or (2) fails to provide end users a full choice of ISPs via its information access service; or (3) offers the service directly to end users rather than to ISPs.[14]

Unfortunately, Bell Atlantic's current information access service is a three-time loser that violates each of the above provisions. As ALTS pointed out in its June 16, 1997 Opposition to BA CEI Amendment (CCB Pol. 96-09), Bell Atlantic's "Internet

---

[14] Non-Accounting Safeguards Order, ¶ 57: " ... we conclude that the term 'interLATA information service' refers to an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component provided to the customer for a single charge." Bell Atlantic's advertisements claim its services (which include an interLATA function) are being provided by Bell Atlantic Internet Solutions Inc.

Nor would it be a defense if Bell Atlantic could show it were only reselling an interLATA service. See Non-accounting Safeguards at 276: "We note that even when an information service and interLATA transmission service are ostensibly separately priced, if the BOC offers special discounts or incentives to customers that take both services, this would constitute sufficient evidence of bundling to render the information service an interLATA information service" (emphasis supplied).

Protocol Routing Service" or "IPRS" is: (1) bundled with interLATA information services charges; (2) fails to provide end users with a full choice of ISPs; and (3) is directed to end users rather than ISPs. Thus, Bell Atlantic's IPRS is currently being provisioned illegally by Bell Atlantic because it is not offered via a section 272 subsidiary, among other defects.

B. The RBOCs Are Violating their CEI Plans By Discriminating Against ISP Traffic Carried by CLECs Through Their Refusal to Pay Reciprocal Compensation.

As the Commission is well aware, the ILECs are currently violating the Commission's long standing rule requiring that calls to ISPs be treated as though such calls were local for compensation purposes.[15] Although the ILECs originally acknowledged that these calls would indeed be encompassed within their reciprocal compensation agreements,[16] they have announced

---

[15] See, e.g., MTS and WATS Market Structure, 97 FCC 2d 682, 715 (1983); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631, 2633 (1988).

[16] See Reply Comments of Bell Atlantic filed May 30, 1996, in CC Docket No. 96-98 at 21: "Moreover, the notion that bill and keep is necessary to prevent LECs from demanding too high a rate (continued...)

that such calls are "really" interstate, and thus not subject to reciprocal compensation (without explaining why their reciprocal compensation agreements with adjacent LECs do include this traffic). So far the scoreboard on final state decisions on this issue reads "CLECs 12, ILECs 0."

The relevance of this issue to the present proceeding is that the BOCs' failure to pay compensation for ISP calls is also a separate and independent violation of the BOCs' CEI plans. For example, according to Bell Atlantic (Reply Comments in CCB Pol. 96-09 at 6): "Competing enhanced service providers may obtain any underlying basic service at the same tariffed rates as Bell Atlantic's enhanced service, thereby ensuring no discrimination or preference." And in its most recent CEI amendment request it states (at 3): "Bell Atlantic's vendor will subscribe to local telephone services -- either standard business

---

[16](...continued)
reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and internet access providers. The LEC would find itself writing large monthly checks to the new entrant." (Emphasis supplied.)

lines or ISDN -- to receive the call" (emphasis supplied).

But Bell Atlantic fails to mention what happens to those ISPs that choose to obtain service from CLECs rather than Bell Atlantic. Under Bell Atlantic's proposed Amendment, ISPs that use Bell Atlantic service will obtain access using local rates (" ... the third party [ISP] will subscribe to local telecommunications services within the NYNEX states ...;" Amendment Request at 2), but under Bell Atlantic's new reciprocal compensation theory, identically situated ISPs served by CLECs get slapped with a totally different arrangement for handling those local calls.

It makes no difference, of course, that Bell Atlantic imposes this discrimination through its interconnection with the CLEC serving the ISP, rather than directly upon the ISP itself. Under competitive conditions, imposing different prices on CLECs for the exchange of ISP traffic than for other local traffic will inevitably force the CLECs to pass on the difference to the ISP, thereby putting that ISP in a different position vis-a-vis

identically situated ISPs served by Bell Atlantic.[17]

C. BellSouth Has Created An In-Region CLEC to Provision In-Region Information Services, As Well As Other Services, Without Complying with Section 272.

BellSouth recently received approval to operate a CLEC subsidiary in Georgia, and is attempting to claim similar authority in other in-region states, such as North Carolina (see BellSouth BSE, Inc. -- Application for a Certificate of Public Convenience and Necessity to Provide Local Exchange and Exchange Access Services as a Competing Local Provider in North Carolina, Docket No. P-691, Sub. 0). According to discovery in these proceedings, BellSouth's CLEC plans to use the BellSouth name and logo, employ the financial backing of BellSouth, and may deploy interLATA information services.

It should be obvious that BellSouth cannot use a non-section 272-compliant subsidiary to perform any information services that require section 272 compliance. Unfortunately, this does not

---

[17] The fact Bell Atlantic declines, to the best of ALTS' knowledge, to also impose its new theory on local traffic to ISPs which it exchanges with adjacent LECs is also a separate and independent reason why this new position is illegally discriminatory.

appear obvious to BellSouth. The Commission should not consider any relief from structural or CEI requirements on an intraLATA basis until the BOCs provide adequate assurances that they (including their CLEC subsidiaries) are fully complying with all in-region section 272 requirements.

CONCLUSION

For the foregoing reasons, ALTS requests that the Streamlined Information Services FNPRM be implemented consistent with these comments.

Respectfully submitted,

By: Richard J. Metzger emw

Richard J. Metzger
Emily M. Williams
Association for Local
Telecommunications Services
888 17 Street, N.W., Suite 900
Washington, D.C. 20006
(202)969-2583

March 26, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 1998, copies of the foregoing Comments of the Association for Local Telecommunications Services were served via first class mail, postage prepaid, or by hand as indicated to the parties listed below.

Emily M. Williams

Emily M. Williams

Magalie Roman Salas*
Secretary
Federal Communications Commission
1919 M street, N.W.
Washington, D.C. 200554
Original and six copies

Richard Metzger*
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Richard Welch*
Chief, Policy and Program
Planning, CCB Rm 544
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Janice Myles*
Rm 544
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
(1 copy and diskette)

ITS*
1231 20th Street, NW.
Washington, D.C. 20036

* by hand